REMARKS

In the Office Action pending claims 22-39 were rejected under by the Examiner.

Herein independent claims 22, 27 and 29 are amended, dependent claim 37 is amended, and no new claims are added, so claims 22-39 are pending examination on the merits.

Applicants herewith present a paragraph from page seven of the application as filed wherein the serial number of the co-pending application is filled-in.

Applicants respectfully request entry and favorable consideration of the amendments and remarks presented herewith.

Claim Rejection Under 35 U.S.C.§112

Claim 37 was rejected ass being indefinite and the Examiner suggested a claim amendment intended to rectify the alleged lack of precision in the claim. Applicants herein amend claim 37 along the lines suggested by the Examiner and thank the Examiner for the suggested claim change.

Claim Rejections Under 35 U.S.C. §102

Claims 22, 23, 29, 30, 36 and 37 stand rejected under 35 U.S.C. §102(e) as anticipated by U.S. Pat. No. 5,697,958 to Paul et al. (Paul).

Claims 22, 23, 29, 30, 36 and 37 stand rejected under 35 U.S.C. §102(b as anticipated by U.S. Pat. No. 4,091,818 to Brownlee et al. (Brownlee).

Applicants respectfully traverse the rejections as enumerated hereinbelow.

"A single prior art reference anticipates a patent claim if it expressly or inherently describes each and every limitation set forth in the patent claim." Trintec Indus. Inc. v. Top-U.S.A. Corp., 63 USPQ2d 1597, 1599 (Fed. Cir. 2002).

"Inherent anticipation requires that the missing descriptive material is 'necessarily present,' not merely probably or possibly present, in the prior art." Id.

Each independent claim has been amended to recite subject matter not present in any single reference relied upon by the Examiner.

In view of the differences between the claimed subject matter and the applied references identified above, Applicants respectfully assert that the rejections must be withdrawn. For example, nothing in Paul or Brownlee suggests or describes use of prior intrinsic or evoke heart rate data and using such data to set a new or different heart rate during exposure to supra-threshold high frequency (HF) radiation.

Claim Rejections Under 35 U.S.C. § 103

Claims 22-39 stand rejected as anticipated by, or in the alternative obvious over (EP 0931566) to Vock et al. (Vock).

In connection with combining references to support an assertion of obviousness, it is well established that the Examiner bears the burden of establishing a *prima facie* case of obviousness. In re Oetiker, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). In doing so, the Examiner must determine whether the prior art provides a "teaching or suggestion to one of ordinary skill in the art to make the changes that would produce" the claimed invention. In re Chu, 36 USPQ2d 1089, 1094 (Fed. Cir. 1995). A *prima facie* case of obviousness is established only when this burden is met.

The burden is still on the Examiner even when the Examiner relies upon a single reference. "Even when obviousness is based on a single prior art reference, there must be a showing of a suggestion or motivation to modify the teachings of that reference." In re Kotzab, 55 USPQ2d 1313, 1316-17 (Fed. Cir. 2000).

In the case of In re Lee, 61 USPQ2d 1430 (Fed. Cir. 2002), the Federal Circuit stated: "This factual question of motivation is material to patentability, and [can] not be resolved on subjective belief and unknown authority." Id. at 1434. Determination of patentability must be based on evidence, id. at 1434, and the Examiner provided none: no references pertaining to aggregation or averaging were cited, no official notice was taken, no evidence of any kind was presented. The Examiner's failure to present an evidentiary basis for the decision is clearly a legal error. Id. Assertions such as "common knowledge and common sense," even if assumed to derive from the Examiner's expertise, are not evidence, and conclusory statements do not fulfill the Examiner's obligation to make an evidentiary record. Id. at 1434-35; In re Dembiczak, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999).

If indeed the elements were known in the art, then the Examiner ought to present evidence to support that conclusion. In re Lee, 61 USPQ2d at 1435 ("[W]hen they rely on what they assert to be general knowledge to negate patentability, that knowledge must be articulated and placed on the record."). The failure to do so renders the Examiner's rejection arbitrary, capricious and unreasonable. See id. at 1434. The Examiner may not arbitrarily, capriciously and unreasonably deny a claim by a mere declaration of obviousness without a supporting evidentiary record.

The Examiner presented no evidence of any suggestion or motivation to modify the Wilson techniques to arrive at the claimed invention. Nor has the Examiner presented any evidence that the recited elements are known in the art. The record consists exclusively of conclusory statements by the Examiner, which are not evidence and which cannot support rejections under 35 U.S.C. § 103.

For at least these reasons, the Examiner has failed to establish a *prima facie* case for non-patentability of Applicant's claims 22-39 under 35 U.S.C. § 103(a). Withdrawal of this ground of rejection is hereby earnestly and respectfully requested.

As noted hereinabove nothing in Vock teaches or describes the limitations now recited in each independent claim. Therefore each said independent claim and all claims depending directly and indirectly therefrom are now also patentably distinct from the cited and applied art.

CONCLUSION

Applicants respectfully assert that all pending claims 22-39 of the present application are now in condition for allowance. Applicant respectfully requests reconsideration and prompt allowance of all pending claims. Please charge any additional fees or credit any overpayment to deposit account number 13-2546. The Examiner is invited to telephone the below-signed attorney to discuss this application.

Respectfully submitted,

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